

**Iowa Department of Natural Resources  
Environmental Protection Commission**

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**ITEM**

**8**

**INFORMATION**

**TOPIC**

**CDI/Winnebago – Appeal of Proposed Decision**

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On several separate occasions, CDI and Winnebago appealed DNR's determinations that the CDI and Winnebago facilities constitute one major stationary source at their locations in both Charles City and Forest City, Iowa. These appeals have been before the EPC once already, on appeal of the administrative law judge's decision to grant summary judgment. That decision was ultimately overturned by the Hancock County District Court, who remanded this matter back for a full contested case hearing.

On May 28 and 29, 2008, a contested case hearing was held before an administrative law judge in the consolidated appeals. A Proposed Decision was issued on August 11, 2008, upholding DNR's determinations that the CDI and Winnebago facilities constitute one major stationary source in each city. On September 11, 2008, a joint appeal of the Proposed Decision was filed by CDI and Winnebago.

According to the provisions of 561 Iowa Administrative Code 7.17(5)"d", the director shall issue a schedule for consideration of the appeal. The director has set forth a briefing schedule whereby each party may file a brief and a responsive brief. Briefs shall be due to the director by October 8, 2008. Responsive briefs shall be due to the director by October 20, 2008. Briefs shall be no longer than 25 pages, and reply briefs shall be no longer than 10 pages. Written requests to present oral arguments shall be filed with the briefs.

The record in this case includes the notices of appeal, pleadings, motions, rulings, and filings listed in Attachment "A" to the Proposed Decision, including the record on appeal before the EPC and the District Court; the parties' "Stipulated Facts" filed on May 28, 2008; the exhibits listed in Attachment "B" to the Proposed Decision; the hearing transcript; and the Post Hearing and Reply Briefs of the parties. A copy of the Proposed Decision, including Attachments "A" and "B", is attached. As the record is voluminous, each of the EPC Commissioners will be provided with an electronic version of the scanned record.

Anne Preziosi, Attorney  
Legal Services Bureau

September 22, 2008

Iowa Department of Inspections and Appeals  
Division of Administrative Hearings  
Wallace State Office Building  
Des Moines, Iowa 50319

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IN THE MATTER OF:	)	
	)	PROPOSED DECISION
CDI, LLC and	)	
	)	
WINNEBAGO INDUSTRIES	)	DIA NO. 06DNR008

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PROCEDURAL HISTORY

On March 14, 2006, the Iowa Department of Natural Resources (DNR) transmitted the following appeals, filed by CDI, LLC (CDI) and Winnebago Industries, Inc. (Winnebago), to the Iowa Department of Inspections and Appeals (DIA) for a contested case hearing:

- CDI's February 17, 2005 appeal from 18 air quality construction permits issued for its Charles City facility;
- Winnebago's March 25, 2005 appeal from its Title V Operating Permit for its Forest City facility;
- CDI's November 22, 2005 appeal from 24 air quality construction permits for its Forest City facility.

On December 7, 2006, ten additional appeals presenting the same issue were consolidated into this contested case.<sup>1</sup>

On October 25, 2006, the DNR filed a Motion for Summary Judgment, which both Appellants resisted. On December 29, 2006, the undersigned administrative law judge issued a ruling granting the DNR's Motion for Summary Judgment (hereinafter, "ALJ ruling") The Appellants appealed the ALJ ruling to the Environmental Protection Commission (EPC). On April 3, 2007, the EPC affirmed the ALJ ruling by operation of law, after motions to reverse and approve the ruling failed on 3-3 votes. The Appellants then filed a petition for judicial review of the EPC final decision with the Hancock County District Court. On December 3, 2007, the Honorable Paul W. Riffel issued a Ruling (hereinafter,

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<sup>1</sup> See Motion for Consolidation of Appeals, filed on October 25, 2006, for listing of the ten additional appeals.

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"District Court Ruling") reversing the final agency action granting summary judgment and remanding the contested case back to the agency for an evidentiary hearing on the merits.

A contested case hearing was held before the undersigned administrative law judge on May 28 and 29, 2008 at the Administrative Hearings Division, Wallace State Office Building, Des Moines, Iowa. Staff Attorney Anne Preziosi represented the DNR. Attorney Madonna McGrath represented CDI with Jane McAllister as local counsel. Attorney Steven Nelson represented Winnebago. A certified court reporter recorded the proceedings. The record was held open until June 30, 2008 for the parties' simultaneous post-hearing briefs and until July 11, 2008 for reply briefs.

#### **THE RECORD**

The record includes the notices of appeal, pleadings, motions, rulings, and filings listed in Attachment "A," including the record on appeal before the EPC and the District Court, the parties' "Stipulated Facts" filed 5/28/08, the exhibits listed in Attachment "B," the hearing transcript, and the Post Hearing and Reply Briefs of the parties.

#### **SUMMARY OF LEGAL ISSUES/SCOPE OF HEARING**

The parties stipulated to the following legal issues in their Statement of Factual and Legal Issues filed on April 1, 2008:

1. Whether the CDI and Winnebago facilities in Forest City, Iowa, are one major stationary source according to the provisions of 40 CFR 52.21(b)(5) and (6), adopted by reference at 567 Iowa Administrative Code 22.4.
2. Whether the CDI and Winnebago facilities in Charles City, Iowa, are one major stationary source according to the provisions of 40 CFR 52.21(b)(5) and (6), adopted by reference at 567 Iowa Administrative Code 22.4.

Pursuant to 40 CFR 52.21(b)(5), as adopted by reference at 567 IAC 22.4 (now found at 567 IAC 33.3(1)), the DNR has legal authority to determine major stationary source status

for the permitting and regulation of air pollutant emitting facilities under its jurisdiction.

Pursuant to 40 CFR 52.21(b)(6), in order to be one single major stationary source, the two facilities must:

- a) belong to the same industrial grouping;
- b) be located on one or more contiguous or adjacent properties; **and**
- c) be under the common control of the same person (or persons under common control)

(emphasis supplied). The parties have stipulated that the CDI and Winnebago facilities in Forest City and Charles City are (a) in the same industrial grouping (share the same SIC<sup>2</sup> Code) and (b) are adjacent to each other.<sup>3</sup> The only contested issue is the third requirement: whether the facilities at the two locations are under the common control of the same person (or persons under common control). The DNR has the burden of proof on this issue and must establish common control by a preponderance of the evidence.

In reversing the Summary Judgment Ruling and remanding the case for evidentiary hearing, the Hancock County District Court found that the ALJ did not discuss or apply the correct test for common control. The court further found that:

- the United States Environmental Protection Agency (EPA) has adopted the definition of "control" found in the Security and Exchange Commission (SEC) regulations at 17 C.F.R. §240.12b-2 and has applied that definition in numerous determinations over a period of 19 years;
- the control determination is factually driven and should be determined on a case-by-case basis but that this case presented numerous factual issues and inferences with respect to the issue of "control" that precluded summary judgment;
- Winnebago has no ownership of voting shares in CDI;
- the service agreements between Winnebago and CDI do not grant Winnebago the power to direct the management policies or equipment of CDI; and

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<sup>2</sup> Standard Industrial Classification

<sup>3</sup> See Statement of Factual and Legal Issues.

- the DNR did not establish as a matter of law that Winnebago has decision-making control regarding pollution emissions at CDI.

District Court Ruling, pp. 5-6. The court remanded the case to the agency for a hearing on the merits to determine whether either [Appellant] has the ability to control the pollution control decisions of the other [Appellant]. District Court Ruling, p. 6. Given the relationship between the two Appellants, for all practical purposes the issue is whether Winnebago has the ability to control the pollution control decisions of CDI.

The DNR did not appeal the District Court's Ruling and it became the law of the case and is binding on the agency. See United Fire and Casualty Co. v. Iowa District Court for Sioux County, 612 N.W.2d 101,103(Iowa 2000)(all questions decided by a reviewing court are binding on any lower court); Feller v. Scott Co. Civil Service Comm'n, 482 N.W.2d 154, 159 (Iowa 1992)(rulings on issues squarely before the reviewing court are enforceable and binding).

The parties disagree on the permissible scope of the evidentiary hearing. The Appellants assert that the District Court Ruling precludes reliance on the Appellants' service agreements to establish common control. However, the undersigned administrative law judge agrees with the DNR's narrower reading of the District Court Ruling. The District Court Ruling does not preclude consideration of the Appellants' service agreements in making the common control determination but rather found that the summary judgment record, including the service agreements, failed to establish as a matter of law that Winnebago had decision-making control regarding pollution emissions at CDI because there were genuine issues of material fact that precluded summary judgment and because the summary judgment ruling improperly drew factual inferences against the Appellants.

#### FINDINGS OF FACT

1. Winnebago is a publicly traded corporation that has been in the business of manufacturing and selling recreational vehicles for fifty years. Its principal place of business is in Forest City, Iowa, where it manufactures Class A motor homes. Winnebago has a second, smaller manufacturing facility in Charles City, Iowa, where it

manufactures Class C motor homes and Class B conversion vans. Winnebago has a third facility in Hampton, Iowa that is not at issue in this appeal. (Stipulated Fact #1; Testimony of Robert Olson, p. 502; Todd Dakken, p. 525)

The Winnebago facility at Forest City has its own painting line that formerly did some limited full-body painting of class A motor homes and currently paints the lower half of some motor homes. (Testimony of Robert Olson, p. 506; Todd Dakken, p. 526; David Nagle, p. 446)

2. CDI currently owns and operates recreational vehicle surface coating facilities in Forest City and Charles City, Iowa. (Stipulated Fact #2) CDI is an Indiana limited liability company that was founded in or about December 2001 with its principal place of business in Elkhart, Indiana. Numerous RV manufacturers and RV related businesses are clustered in and around Elkhart, Indiana.

Jeffrey Schwartz and John Bibbo each own 50% of CDI and both had extensive prior experience in the RV industry. Jeffrey Schwartz owns Rollie Williams Paint, an Elkhart based business that manufactures and distributes coatings for the RV industry. John Bibbo owns Carrera Designs, an Elkhart based business that paints RVs for several different manufacturers. (Testimony of Jeffrey Schwartz, Tr. 449-451, 472; CDI Exhibit 1)

Since John Bibbo had painted some Winnebago motor homes in Elkhart on a limited basis prior to 2001, Winnebago contacted John Bibbo when it was considering whether to expand its own full-body paint plant in Forest City or to outsource the custom painting of its RVs. John Bibbo enlisted Jeffrey Schwartz as a possible partner, and the two of them met with representatives of Winnebago to discuss possible terms of a new business relationship. In a July 6, 2001 letter to Winnebago, Mr. Bibbo and Mr. Schwartz outlined a number of changes that they would like to see in the proposed agreement between the companies. On the topic of "Default or Breach of Agreement," Bibbo and Schwartz wrote: "This whole section must be further defined. We are putting all our eggs in the Winnebago basket and it will be important for us to clearly understand your expectations..." (DNR Exhibit 23) Winnebago put Mr. Bibbo and Mr. Schwartz in contact with local and state economic development agencies for assistance in financing the building of a brand-new

painting facility in Forest City, Iowa. (DNR Exhibit 24; Testimony of Jeffrey Schwartz, pp. 448-452)

3. On or about March 1, 2002, Winnebago and Forest City Economic Development (FCED) entered into a five-year renewable Services Agreement with CDI with the intent to develop a long-term relationship. The Services Agreement addresses in detail the contract services to be performed by CDI for products produced by Winnebago at its Forest City location. (Stipulation of Fact #18; DNR Exhibit 19).

Pursuant to the Services Agreement, FCED agreed to construct the necessary facilities for CDI's business in Forest City and then to lease the facility to CDI.<sup>4</sup> The Services Agreement further provides that:

The parties understand that CDI's and FCED's investment in this project is with the sole intent of expansion of business by providing services to Winnebago. The location and size of the facilities in Forest City, Iowa are entirely dependent upon the commercial relationship between the parties. If the relationship should deteriorate or terminate, then CDI will have little or no interest in continuing to operate the business at this location.<sup>5</sup>

(DNR Exhibit 19, p. 4, Section 6a)

During the term of the agreement and any extensions or renewals thereof, Winnebago granted CDI the exclusive right to perform contract services necessary for the application of painted finishes to Winnebago's products. Work is requested, performed and remunerated in accordance with Exhibit "A" Scope of Work, which was included with and made part of the agreement. (DNR Exhibit 19, p. 2, Section 1) Exhibit "A" is a six-page document that addresses the parties' agreements with respect to receiving policy, preparation for paint, application of paint film(s), quality control, rework procedures, final assembly, shipping procedures, cost projections, volume projections,

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<sup>4</sup> FCED leases the building to CDI under a 10 year capitalized lease with a \$1 buyout at the end of the lease. (Testimony of Jeffrey Schwartz, pp. 458-459)

<sup>5</sup> The Services Agreement later executed between CDI and Winnebago for the Charles City facility contains a similar provision. (DNR Exhibit 20, p. 5)

accounting and remuneration procedures, and warranties.  
(DNR Exhibit 19, Exhibit "A")

4. On April 12, 2002, representatives of CDI (Jeffrey Schwartz, John Bibbo, and David Nagle<sup>6</sup>), the DNR (Senior Environmental Engineer Christopher Roling; David Phelps, Supervisor Construction Permit Sections, Air Quality Bureau; Catharine Fitzsimmons, Air Quality Bureau Chief), and the Iowa Department of Economic Development met to discuss a number of environmental issues related to CDI's proposed business operations, including the pre-construction permitting issues. No one from Winnebago attended the meeting. On April 15, 2002, Christopher Roling sent a follow-up email which stated, in part, that it appeared from the information provided that CDI would be considered a "support facility." (Testimony of Christopher Roling, Tr. 51-54; Jeffrey Schwartz, pp. 460-461; David Phelps, pp. 171-172; DNR Exhibit 8; CDI Exhibit 2)

5. On April 22, 2002, Christopher Roling sent a letter that summarized the issues discussed at the April 12<sup>th</sup> meeting. The letter was sent to David Nagle, and copies were sent to John Bibbo and Jeffrey Schwartz of CDI and the IDED representatives.<sup>7</sup> In this letter, Mr. Roling:

- cites the three requirements that must be present for multiple emission units to be considered a single source: are on contiguous or adjacent lands, have the same 2-digit Standard Industrial Classification (SIC), and are under common control.
- concluded that CDI and Winnebago met the first two requirements for being considered a single stationary source because they will be located on property that is either touching or in close proximity and because

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<sup>6</sup> CDI did not formally hire David Nagle as its General Manager until two months later, but asked him to attend the meeting because he had a lot of relevant experience. Mr. Nagle has a master's degree in civil and environmental engineering and an MBA. For the eighteen years immediately prior to joining CDI, Mr. Nagle was employed as an Environmental Control Manager for a company that manufactured trucks. At the April 2002 meeting, Mr. Nagle wrote his name on John Bibbo's Carrera Designs' business card and gave it to the DNR. Mr. Roling incorrectly assumed that CDI and Carrera Designs, Inc. were one company and addressed his initial correspondence to Dave Nagle at Carrera Designs, Inc. (Testimony of David Nagle, pp. 405-406; Jeffrey Schwartz, p. 460; Christopher Roling, pp. 52-54; DNR Exhibits 8, 9)

<sup>7</sup> The letter was not sent to anyone at Winnebago.



CDI and Winnebago will share the same two digit SIC code: 37.

- noted that even if CDI and Winnebago do not share an SIC code, they "could be linked as support facilities" because "[e]mission units that support a source are considered part of the source even if the SIC code is different."
- described the steps the DNR goes through to determine whether a support facility relationship exists, including but not limited to an evaluation of the primary activities at the site and whether the emission units convey, store or otherwise assist in the production of the principal product.<sup>8</sup>

Christopher Roling went on to describe three types of mechanisms for establishing common control:

- through the ownership of multiple sources by the same parent corporation or by a parent and a subsidiary of the parent corporation;
- if an entity has the power to direct the management and policies of a second entity, thus controlling the operations through a contractual agreement or a voting interest; or
- when there is a contract for service relationship between the two companies or if a support/dependency relationship exists between the two companies.<sup>9</sup>

Mr. Roling further stated:

It is the [DNR's] understanding that CDI and Winnebago have a contract for CDI to paint assembled Winnebagos thereby creating a support/dependency relationship between the two companies. CDI's operations support Winnebago's

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<sup>8</sup> This highlighted language is found in the Federal Register, Vol. 45, No. 154, p. 52695 (Federal Preamble to 40 CFR Parts 51, 52 and 124) (DNR Exhibit 10). While the Appellants agree that they belong to the same industrial grouping, they contend that the DNR made the erroneous assumption that if there was a support facility relationship sufficient to satisfy the same industrial grouping prong of the three-part test, then the common control requirement was automatically satisfied as well.

<sup>9</sup> Mr. Roling did not cite the legal authority for the three mechanisms for establishing common control, but they appear to have been taken verbatim from the EPA's 11/12/98 guidance document that was attached to the letter (DNR Exhibit 8).

operations by painting a finish on the motor homes. At this time Winnebago is the only customer for CDI and therefore is considered a wholly dedicated support facility.

DNR's staff had not seen and did not review or analyze the Forest City Service Agreement prior to sending the April 22nd letter to CDI. The letter advised CDI that since Winnebago was already classified as a major source, CDI would also be subject to the PSD requirements as a major source.<sup>10</sup> The letter did not explicitly state that CDI and Winnebago were under common control. (DNR Exhibit 8; Testimony of Christopher Roling, pp. 96-97; David Phelps, pp. 256-257)

Mr. Roling attached a number of EPA guidance documents/policy memos concerning support/dependency relationships and determinations of common control to the April 22<sup>nd</sup> letter. The letter also referred CDI to an EPA website where additional EPA guidance documents could be found. (Testimony of Christopher Roling, Tr. pp. 54-82; 91-92; DNR Exhibit 8)

6. CDI did not appeal the DNR's initial determination that they were a support facility for Winnebago. David Nagle explained that CDI did not appeal because: they considered themselves to be the "new kids on the block," everyone seemed to be working together to help bring their business venture to fruition, he had no prior exposure to the support facility concept, and CDI had no reason at that juncture to believe that the DNR was not making a correct determination. (Testimony of David Nagle, pp. 310, 408)

7. On May 15, 2002, Jeffrey Schwartz wrote to Bruce Hertzke, the CEO of Winnebago Industries, to update him on the progress of CDI's air permit construction applications. In this letter, Mr. Schwartz advised Mr. Hertzke that:

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<sup>10</sup> Sources required to obtain a PSD permit must go through a more demanding permitting process that includes installing Best Available Control Technology (BACT), conducting a more detailed air quality analysis and an additional impacts analysis, and going through public notice and comment.

- CDI had been required to conduct a BACT<sup>11</sup> evaluation because DNR considered them to be a support facility for Winnebago;
- CDI had hired an environmental consultant (RMT) and the initial BACT evaluation results were not favorable;
- In order to meet Winnebago's projections for the number of units to be painted past year one, CDI would have to install control technologies to help reduce emissions;
- The control technologies are very expensive and would dramatically increase the amount CDI would have to charge Winnebago per unit to cover the cost of the capital investment in the control technologies.

After describing CDI's various options, Jeffrey Schwartz asked Bruce Hertzke for "advise, help, and direction," and further asked Mr. Hertzke to call him to discuss the matter when he had a chance. There is no written reply from Mr. Hertzke in this record. By the time of the hearing, Robert Olson had replaced Mr. Hertzke as Winnebago's CEO. (Testimony of Jeffrey Schwartz, pp. 487-490, 492; Wayne Venzke, Tr. pp. 517-519; David Phelps, p. 221; DNR Exhibit 25)

8. Wayne Venzke has been in charge of environmental compliance for Winnebago for fifteen years although Winnebago also uses the services of an environmental consulting firm, Larsen Engineering. Mr. Venzke had not seen Jeffrey Schwartz's May 15<sup>th</sup> letter to Bruce Hertzke until it was shown to him at the hearing. Winnebago has not been involved in any of CDI's permit applications, and Mr. Venzke did not know that DNR had determined that Winnebago and CDI were one single major stationary source until Winnebago attempted to add additional capacity to its Charles City facility in February 2003. Winnebago representatives have attended only one joint meeting with DNR and CDI - a 2004 meeting to discuss the single stationary source issue. (Testimony of Wayne Venzke; Tr. 512-521; Jeffrey Schwartz, pp. 459-460; Testimony of Robert Olson, p. 507)

9. In July 2002, CDI applied to the DNR for its first air permits for the Forest City location. (DNR Exhibit 14) The DNR issued the first permits on September 16, 2002 and CDI

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<sup>11</sup> Best Available Control Technology

began its operations in Forest City on September 27, 2002. (DNR Exhibits 7, 15; Testimony of Glenn Carper, p. 140).

In May 2003, CDI applied for a permit modification to allow increased emissions at its Forest City facility due to a significant increase in demand from Winnebago for its painting services. CDI's environmental consultant, Residuals Management Technology (RMT), assisted them with this permit application. After the initial application was submitted, CDI and DNR reached an impasse on the required BACT analysis.

CDI eventually retained a second consultant, Gary McCutchen, P.E. of RTP Environmental Associates<sup>12</sup> to help them with the BACT analysis. Mr. McCutchen retired from his position as chief of the EPA's New Source Review section in 1992, but continues to be a recognized expert on PSD permit issues. He is a frequent presenter at training sessions sponsored by the EPA and state agencies, and DNR staff frequently attend his courses.

In December 2003, CDI submitted a revised BACT analysis and additional impacts analysis to support its requested permit modifications. However, the DNR did not finally approve and issue the modified permit for CDI's Forest City facility until nearly two years later, on October 18, 2005. (Testimony of Christopher Roling, Tr. p. 80, 112; David Phelps, pp. 180-184, 323, 330; Catharine Fitzsimmons, Tr. p. 360; George Welch, Tr. p. 399; Dave Nagle, Tr. 311-312, 426, 435-436; Deposition of Gary McCutchen, p.21-22; 65; DNR Exhibits 7, 16-18; CDI Exhibit 18).

10. In January 2003, Winnebago and CDI were engaged in discussions for CDI to operate a full-body and skirt paint finish operation in Charles City to paint motor homes manufactured at Winnebago's Charles City plant, similar to the two companies' operations in Forest City. In a first draft of its business plan for its Charles City operation, CDI states that it intends for Winnebago to be its only customer. (Testimony of Todd Dakken, pp. 530-534; DNR Exhibit 27). On April 11, 2003, CDI submitted its initial

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<sup>12</sup> In addition to advising CDI on the BACT analysis, Mr. McCutchen also advised CDI that he disagreed with the DNR's determination that CDI and Winnebago constituted a single stationary source. Mr. McCutchen's deposition is CDI Exhibit 43, and his opinions on the single stationary source issue will be summarized and discussed later in this proposed decision.

applications for air quality construction permits for its proposed Charles City painting facility. (DNR Exhibit 7; Winnebago Exhibit 6)

On or about February 27, 2004, Winnebago and CDI entered into a Services Agreement for the Charles City facilities, which was nearly identical to the Forest City Services Agreement. (DNR Exhibit 20; CDI Exhibit 8) One exception is that the Charles City Services Agreement requires CDI and Winnebago to provide notice to each other prior to making any modification or change to a facility or taking any other action that will require that party to amend one of its existing permits, licenses or approvals under the Air Quality Laws. If either party decides to limit production or to install additional pollution control technology in order to meet its emission limits, it must promptly give notice to the other party. CDI agreed to indemnify Winnebago from and against all loss, cost, liability, claim for fines or penalties by any governmental entity or other party which allege that CDI violated any Air Quality Laws. (DNR Exhibit 20, pp. 3-4) The foregoing contract provisions have little bearing on the common control determination since the Charles City Services Agreement was executed after DNR had already informed CDI and Winnebago that it considered the two to be one major stationery source.

11. The Service Agreements for Forest City and Charles City both include, in part, the following provisions:

- a. Winnebago understands that the capability of applying the painted finishes at consistently high quality levels and at the volumes anticipated requires facilities, equipment and technical skills not currently available to Winnebago. (DNR Exhibits 19, 20, p. 1)
- b. CDI is granted the exclusive right to perform contract services necessary for the application of painted finishes on Winnebago's products. (DNR Exhibits 19, 20, p. 2)
- c. The initial term for both agreements is five years. Following the successful completion of the initial term, and on mutual agreement of the parties, the agreements automatically renew for an additional one year period and continue to renew each year unless terminated by either party. (DNR Exhibits 19, 20, p.2)

- d. Upon request by Winnebago, CDI agrees to provide the services and at all times have available for Winnebago's products the necessary facilities, equipment and technical skills needed to perform such work. The previous sentence notwithstanding, CDI shall have the right to supplement the work with additional retail business or non-competitive products as long as performance of the additional work does not inhibit CDI from performance of the painting services contemplated by this agreement. (DNR Exhibits 19, 20, p. 2)
- e. All surface defects or components must be properly repaired, installed or replaced prior to proceeding with paint film application...Winnebago's quality control inspector or representative... shall be responsible for authorizing the work. (DNR Exhibits 19, 20, p. 9)
- f. Winnebago's quality control inspector or representatives inspect and determine the acceptability of finish items installed by CDI and work performed in Final Assembly. (DNR Exhibits 19, 20, p. 12)
- g. CDI understands and agrees that Winnebago makes no guarantees or representations, expressed or implied, as to the volume or number of vehicles to be processed by CDI during the term of this agreement unless specifically mentioned in the Schedule of Services. Winnebago reserves the right to perform any of the work described herein at its own facilities with its currently-owned full body paint building and its own employees, providing CDI is operating at full production capacity. Prior to expanding its own painting facilities, Winnebago must "provide CDI a reasonable opportunity to increase its own production capacity in order to meet Winnebago's increased painting needs. (DNR Exhibits 19, p. 14; DNR Exhibit 20, p. 13)
- h. Winnebago's guaranteed volume forecasts will be fixed for a rolling three (3) week period. Beyond that period, minor variations will be permissible to reflect changing consumer demand...In the event Winnebago should be unable to meet the guaranteed volume within the three week period, CDI will be reimbursed for operating expenses and lost pre tax net income related to the shortfall. Said reimbursement shall only be to the extent of actual

expenses and lost pretax net income encountered. (DNR Exhibits 19, p. 14; DNR Exhibit 20, p. 13)

- i. Winnebago has exclusive control over the style, color and design of the graphics pattern but shall consult with CDI as to pattern application processes, labor, and costs and price for such pattern. (DNR Exhibit 19, p. 11; DNR Exhibit 20, p. 10)
- j. CDI is solely responsible for application methodologies and the materials used in the application of paint film. Winnebago's only concern is adequate paint coverage, durability and uniform flow out. CDI is responsible for the selection and use of equipment and materials needed to accomplish the task. (DNR Exhibit 19, p. 11; DNR Exhibit 20, p. 10)
- k. CDI shall evaluate the Schedule of Services and determine the extent of facilities, equipment and human resources needed to accomplish Winnebago's requirements. CDI shall conduct its business so as to be able to respond accordingly. (DNR Exhibit 19, p. 11; DNR Exhibit 20, p. 10)
- l. CDI is responsible for all permitting and all environmental conformance in conducting its business. This shall include but not be limited to obtaining stack permits, hazardous waste collection and removal, and safety. (DNR Exhibit 19, p. 11; DNR Exhibit 20, p. 10)

12. CDI selects the type of paint to be applied to the Winnebago motor homes, and Winnebago selects the colors and the designs. CDI has chosen to use Sherwin Williams' paint even though Winnebago uses DuPont paint at its own painting facility. Jeffrey Schwartz has used the chemists and proprietary technologies from his paint company in Elkhart (Rollie Williams) to manipulate CDI's coating system to obtain lower volatile organic compounds (VOC) and hazardous air pollutants (HAP), in order to meet the VOC and HAP limits imposed on CDI in Forest City. (DNR Exhibit 19, p. 11; Exhibit 20, p. 10; DNR Exhibit 25; CDI Exhibit 11, Attachment 2, p. 1; Testimony of David Nagle, pp. 417-418; Jeffrey Schwartz, pp. 463-464; Robert Olson, p. 506)

13. General Manager David Nagle described the typical work flow between Winnebago and CDI at both locations. Winnebago is responsible for driving the motor homes to CDI's property to be painted and for driving the motor

homes back to Winnebago when the painting is completed. CDI personnel wash the vehicle and remove components, e.g. various lights and mirrors, which might interfere with the painting process. The motor home is painted in a multi-stage process and then reassembled. The parts that were removed are replaced and then awnings are installed by CDI personnel. The final production stages include any necessary repairs, repainting, and then inspections by one of the three Winnebago inspectors working full-time at the CDI facilities. When Winnebago's inspectors have approved the paint job, a Winnebago employee drives the motor home back to Winnebago's facility. (Testimony of David Nagle, Tr. pp. 419-423, 442-446)

14. Winnebago does not pay for any of CDI's employees or for any of CDI's operating expenses at Forest City or Charles City. CDI's water and utility systems are separate from Winnebago. Winnebago does not own any of CDI's equipment or buildings and both companies have separate human resources, employee benefit plans, and accounting systems and accounting firms. Winnebago uses Deloitte and Touche for their accounting, and CDI uses McGladrey & Pullen. CDI provides monthly financial statements to Winnebago, which Deloitte and Touche presents to the Securities and Exchange Commission (SEC) to verify that they are separate companies under separate ownership. (Testimony of Jeffrey Schwartz, p. 461-462, 465-466)

15. At the current time, 99+% of CDI's business at the Forest City facility is conducted on behalf of Winnebago. The total amount of paint used for clients other than Winnebago at CDI's Forest City facility from January 1, 2007 through May 6, 2008 is approximately 118.5 gallons. (Testimony of David Nagle, p. 438; DNR Exhibit 30)

98+% of CDI's business at the Charles City facility is conducted on behalf of Winnebago. At this location, CDI also paints for individual retail customers who own a motor home (either a Winnebago or a competitor) and want to add full-body paint or change the paint. CDI has also painted motor homes for Born Free, a small manufacturer of Class C motor homes located in Humboldt, Iowa. Recently, CDI has created several designs for Liquid Glass, a start-up company located in Sumner, Iowa that manufactures high-end powered catamarans. CDI has painted one catamaran for Liquid Glass. (Testimony of Dave Nagle, pp. 424-426, 438)



16. On February 4, 2004, the DNR's Environmental Protection Commission (EPC) filed a Notice of Proposed Rulemaking to address some of the terms used by the DNR to determine whether a construction permitting project is subject to PSD. The proposed rulemaking included definitions for "common control" and "support facility." George Welch has been an Environmental Engineer with the DNR for 35 years and helped draft the definitions in the proposed rulemaking. "Common control" was defined, in part, to include "The presence of a service arrangement where discretionary action taken at one location will, without discretion, trigger action at the other location." The definition of "support facility" did not require a showing of common control. The Notice stated that without these changes the meaning of the terms must be determined by referring to various letters, memoranda, and other types of documents created by the EPA or the DNR. However, after receiving adverse comments from industry representatives and the EPA, the DNR elected to terminate the proposed rulemaking. (Testimony of David Phelps, pp. 278-283; Catharine Fitzsimmons, pp. 345-348; George Welch, pp. 395-398; CDI Exhibit 34)

17. On March 29, 2004, David Nagle and CDI consultant Gary McCutchen met with representatives of the DNR, including Construction Permitting Section Supervisor David Phelps and Senior Environmental Engineer Karen Kuhn to discuss several issues, including whether CDI should be considered a separate stationary source from Winnebago. (Tr. 260-261, 382-383). Following the meeting, CDI submitted an analytical report prepared by Gary McCutchen entitled, "CDI Separate Stationary Source Position Paper." (CDI Exhibits 11, Attachment 2; 43; 35) Mr. McCutchen's paper states that the EPA has, through policy, further defined the concept of control to include either common ownership (direct control) or common control through contractual or leasing agreements (indirect control). Mr. McCutchen concludes that CDI and Winnebago are separate stationary sources because there is no direct control, i.e. the facilities are not owned or operated by the same controlling entity. With respect to the issue of indirect control, Mr. McCutchen discusses a variety of factors previously set out in EPA policy documents and concludes there is also no indirect control because Winnebago:

- does not control startup and shutdown of CDI;
- does not prohibit CDI from accepting other business;

- does not provide coating materials or utilities to CDI;
- does not own CDI's equipment or building;
- does not control CDI's Board of Directors or Officers;
- does not share payroll or other administrative services with CDI;
- does not share personnel or maintenance staff;
- does not have to provide all of its vehicles to CDI for coating;
- does not need CDI to operate;
- does not control what type of paint is used;
- does not control the in-plant process; and
- does not provide or specify the warranty for CDI services.

(CDI Exhibit 11)

18. On April 20, 2004, the DNR wrote to Joann Heiman at EPA Region VII seeking EPA's guidance on four issues that had arisen with respect to CDI's requested amendment for the PSD permit for its Forest City facility. The DNR briefly described the business relationship between Winnebago and CDI and attached a copy of the Forest City Services Agreement. CDI separately sent Ms. Heiman a copy of Mr. McCutchen's position paper. (DNR Exhibit 31; CDI Exhibit 11)

In its April 20<sup>th</sup> letter, the DNR asks the EPA four questions, but only the first two are relevant to the issues in this case:

- Is it mandatory that common control be demonstrated for inclusion of a support facility in to a major stationary source for purposes of PSD review? [The DNR goes on to state its belief that the production relationship between CDI and Winnebago shows that CDI "serves simply as one of two painting production lines for Winnebago industries..." DNR further states that CDI's operation is so integral to the production of Winnebago motor homes as to fall within the common sense notion of a plant and that this support facility should therefore be incorporated into the major stationary source for purposes of PSD review.]

- If a test for common control must be applied, what contract provisions must exist to demonstrate common control? [DNR admits that it does not believe this analysis is necessary but asserts that if it is, the long term exclusive relationship between the companies is more than sufficient to document common control.]

(DNR Exhibit 31)

19. On April 27, 2004, the DNR issued the initial air quality construction permits for CDI's Charles City facility (04-A0402 through 04-A-414) (Winnebago Exhibits 5, 6; DNR Exhibit 7). The cover letter for the permits, which was written by DNR Review Engineer Sara Piziali but was signed by Senior Environmental Engineer Karen Kuhn, states that the DNR had determined that the Charles City CDI plant is considered a support facility for the Charles City Winnebago plant. According to Ms. Kuhn, at that time the DNR was using the phrase "support facility" as "shorthand" for single stationary source. She described the use of the term "support facility" in this cover letter as "sloppy." Ms. Kuhn explained that single stationary source determination was made because the Charles City CDI plant was the same type of operation as the Forest City plant, and the DNR wanted to treat them consistently. Her supervisor, David Phelps, confirmed that there was no separate single source analysis of the CDI facility at Charles City. (Testimony of Karen Kuhn, pp. 375-381; Testimony of David Phelps, pp. 295, 326).

20. On May 24, 2004, CDI filed its first appeal from the DNR's determination that CDI and Winnebago are a single major stationary source.<sup>13</sup> (Winnebago Exhibit 7; DNR Exhibit 7; CDI Exhibit 12)

On June 7, 2004, the Supervisor of the DNR's Air Operating Permits section sent a letter to both David Nagle, General Manager of CDI, and Robert Olson, Vice President of

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<sup>13</sup> At hearing and in the briefs, DNR emphasized that CDI did not appeal from the initial PSD air quality permits. However, DNR has never explicitly asserted that CDI waived its right to appeal the single source determination and did not raise a waiver argument in its Motion for Summary Judgment. Moreover, the District Court Ruling states that the Appellants "timely appealed the DNR's determination that they are a single major stationary source at their adjoining facilities in Forest City and Winnebago." District Court Ruling, p.2. This proposed decision presumes that the appeal of the stationary source determination was properly preserved by CDI and Winnebago.

Manufacturing for Winnebago, and reminded them about the Title V Operating Permit requirements for CDI and Winnebago's operations at Charles City. The letter reiterated the prior determination that CDI-Charles City is considered a support facility to Winnebago-Charles City and that because of the support facility determination, both plants are considered one major stationary source for Title V applicability purposes. The letter further noted that since Winnebago had filed a Title V permit application on February 3, 2004, Winnebago and CDI could file a supplemental application to include CDI's emissions and receive one Title V permit or CDI could file a separate application along with justification for a separate Title V permit. (Winnebago Exhibit 9)

21. On July 6, 2004, JoAnn Heiman, Acting Chief of the Air Permitting and Compliance Branch for EPA Region VII responded to the DNR's April 20<sup>th</sup> letter that asked for guidance on their single stationary source determination. Ms. Heiman's letter does not include EPA's own analysis but merely states that the DNR's assessment adequately addresses the issues in question and that the DNR's conclusion that the described operations constitute a single source under Iowa's SIP is reasonable and supported by the record. She further stated that the information in the record did not necessitate a change in the DNR's original permitting action. (DNR Exhibit 32)

22. On August 27, 2004, William Spratlin, the Director of Air, RCRA & Toxics Division of EPA Region VII, wrote to DNR Director Jeffrey Vonk, both in reply to Mr. Vonk's July 29, 2004 letter and as follow-up to their meeting on August 18, 2004 at EPA's regional office. In this letter, Mr. Spratlin agrees with the DNR's determination that the CDI and Winnebago facilities in Forest City should continue to be treated as one stationary source, as set forth in DNR's April 20, 2004 letter, and believes that the EPA's other regions would reach the same conclusion. The letter further states that a number of factors indicate a control relationship between the two entities, for example:

- Section 6a of the contract establishes that the sole purpose of the CDI facility is to provide services to Winnebago;

- Section 3 of the contract requires CDI to have its facility's equipment and personnel available "at all times" for Winnebago's products;
- The contract limits CDI's supplemental work to "non-competitive products," and only to the extent that the supplemental work does not interfere with CDI's obligations to Winnebago. Although the contract permits supplemental work, all of CDI's work at Forest City had been for Winnebago.

The letter further stated that:

- Source determinations are very case specific and comparisons of various determinations are useful only to the extent that the facts and applicable regulations are substantially the same in each determination;
- The EPA would not support an interpretation that the test for control must be limited to ownership and there are many determinations that appear to be based simply on interrelationship and the common sense notion of plant/source, without regard to ownership.

(DNR Exhibit 33)

23. During an inspection of the Forest City CDI facility on November 2, 2004, CDI General Manager Dave Nagle informed DNR Inspector Glenn Carper that CDI had exceeded all of its permit limits. Carper also discovered that CDI had moved its original base coat paint booth and had constructed and was using two new base coat booths. In addition, the sanding/prep area had been moved and two new fans had been installed. Nagle told Carper that he proceeded with the changes without first obtaining permits because he had been waiting a year and a half for the Title V Permit and could not wait any longer because Winnebago was providing motor homes to him and he had to paint them. CDI later informed Winnebago's senior management and their counsel that CDI was exceeding its permit limits. (Testimony of Glenn Carper, pp. 141-152; Jeffrey Schwartz, p. 473; David Nagle, p. 427-429; DNR Exhibits 1, 2)

## CONCLUSIONS OF LAW

### ***I. Prevention of Significant Deterioration and Stationary Source Determinations-Background***

The DNR is the agency designated to prevent, abate and control air pollution in Iowa, including the adoption and enforcement of regulations to implement the requirements of the federal Clean Air Act.<sup>14</sup> The multiple permit appeals involved in this contested case arise out of two regulatory programs established under the Clean Air Act: Prevention of Significant Deterioration (PSD) and Title V Operating Permits. The PSD program is designed to prevent significant deterioration of air quality in areas that are currently in attainment of the national ambient air quality standards (NAAQS) by requiring preconstruction review and construction permits (also referred to as New Source Review permits) for new major sources of air pollution emissions or major modifications to existing sources.<sup>15</sup> The entire state of Iowa is in attainment with the NAAQS.<sup>16</sup> The Title V program also requires major sources to obtain and comply with operating permits.<sup>17</sup> The United States Environmental Protection Agency (EPA) has approved Iowa's PSD program and its Title V Operating Permit program.<sup>18</sup> (See also, testimony of Christopher Roling, Tr. 28-31; Deposition of Gary D. McCutchen, CDI Ex. 43)

In deciding whether a particular source of air pollution emissions is subject to the PSD and the Title V permitting programs, the DNR must first determine whether it is a "major" stationary source. A stationary source that does not fall into one of the 28 listed source categories in the regulation is considered "major" if it has potential emissions of 250 tons/yr or more of a regulated New Source Review (NSR) pollutant.<sup>19</sup> CDI and Winnebago do not fall into the category of one of the listed sources and so if their emissions are considered separately, each would be subject to the 250 tons/yr standard before being subject to PSD and the Title V Operating Program. However, if two facilities are determined to constitute a single stationary

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<sup>14</sup> Iowa Code §§455B.132, 455B.133, 455B.134.

<sup>15</sup> 42 U.S.C. §§ 7470-7479.

<sup>16</sup> 40 C.F.R. 81.316.

<sup>17</sup> 42 U.S.C. §§ 7661 through 7661f.

<sup>18</sup> 52 Fed. Reg. 23981 (June 26, 1987); 62 Fed. Reg. 37514-01 (July 14, 1997).

<sup>19</sup> 40 CFR §52.21(b)(1)(i); 567 IAC 33.3(1).

source, then the emissions from both facilities are counted together for the purposes of determining the applicability of the Prevention of Significant Deterioration (PSD) of the Air Quality Program and for purposes of determining the applicability of the Title V Operating Permit Program.

"Stationary source" means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.<sup>20</sup> "Building, structure facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the common control of the same person (or persons under common control)...<sup>21</sup> This definition has been adopted verbatim in Iowa by the Environmental Protection Commission (EPC) at 567 IAC 33.3(1) (formerly found at 567 IAC 22.4). See also 567 IAC 22.100.

The common issue presented by these consolidated appeals is whether the Winnebago and CDI facilities constitute a single stationary source at their locations in Forest City, Iowa and at their locations in Charles City, Iowa. This is significant because if CDI and Winnebago are separate stationary sources, then CDI would be considered a minor source at both locations and could avoid the more stringent PSD permitting requirements until it exceeded the emissions threshold of 250 tons per year. In addition, Winnebago would not be considered a major source at Charles City unless its emissions and CDI's emissions are counted together. (Testimony of Christopher Roling, pp. 45-46; David Phelps; Deposition of Gary McCutchen; Testimony of Wayne Venzke, pp. 514, 520-521; CDI Exhibit 35).

The parties agree that all three elements of the definition, including common control, must be satisfied before two or more sources of emissions are counted together as a single stationary source. The contested issues concern whether the DNR properly evaluated the common control issue and whether the DNR has established (by a preponderance of the evidence) that Winnebago and CDI are under the common control of the same person (or persons under common control).

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<sup>20</sup> 40 CFR 52.21(b)(5).

<sup>21</sup> 40 CFR 52.21(b)(6).

## **II. Common Control**

### **A. How is Common Control Determined?**

The federal and state statutes and rules do not provide a specific definition for common control and there is no relevant case law. In the September 11, 1980 Federal Register Preamble for 40 CFR Part 51, the EPA stated, in relevant part:

Control can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity.

The preamble further states that the EPA solicited comments on a proposal to simplify the test of control, such as some specified voting share, but the comments received did not provide a convincing argument for a simplified test. The EPA decided that determinations of control would be made case-by-case, without a simplifying test, but that the EPA would be guided by the following general definition of "control" used by the Securities and Exchange Commission (SEC):

...the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.

(emphasis supplied) 45 Fed. Reg. 59878 (1980), quoting 17 CFR 210-1-02(g).<sup>22</sup>

Through the years, the EPA has issued a number of memorandums, letters, or other guidance documents on the issue of "common control" in response to specific factual situations. The guidance documents are published and available to the public at the EPA Region VII NSR Guidance Database, and the DNR provided a number of these guidance documents to CDI at the time the initial single stationary source determination was made on April 22, 2002. (DNR Exhibit 8; Winnebago Exhibit 2)

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<sup>22</sup> DNR Exhibit 5 is a copy of the September 11, 1980 Federal Register.



Appellants characterize the DNR citation to and reliance on the EPA's guidance documents as improper rulemaking.<sup>23</sup> Those arguments were not persuasive. Although the EPA guidance documents have not been subject to rulemaking procedures and may not be given dispositive force as a rule of law, the case law permits DNR to consult EPA guidance documents when determining common control on a case-by-case basis. In addition, the DNR may give weight to guidance documents to the extent that the factual pattern presented in the guidance document is similar to the case under consideration.<sup>24</sup>

In addition, the District Court Ruling referred to EPA guidance documents when it held that the EPA has adopted the SEC's definition of control and has applied that definition in numerous determinations over a period of 19 years. Moreover, the District Court quoted from an EPA guidance document dated October 1, 1999 from EPA Region 8 to the Colorado Department of Public Health<sup>25</sup>, which stated that in applying the (SEC) definition in numerous determinations over the past 19 years, the EPA has examined the following four factors:

- Whether control has been established through ownership of two entities by the same parent corporation or a subsidiary of the parent corporation;
- Whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of the second entity;
- Whether there is a contract for service relationship between two entities in which one sells all of its

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<sup>23</sup> See Appellants' brief, pp.9-13. Appellants cite Anderson v. Iowa Department of Human Service, 368 N.W.2d 104, 108 (Iowa 1985) (holding it was error to cite and rely on the DHS Employee Manual, which was not a published rule, as authority for the conclusion of law regarding substantive rights of owners of a joint bank account)

<sup>24</sup> Alaska Dept. of Environmental Conservation v. E.P.A., 540 U.S. 461, 464 (2004) (holding that although EPA's construction of the Clean Air Act as reflected in internal guidance memoranda does not qualify for dispositive force, a cogent administrative interpretation nevertheless warrants respect); City of Des Moines v. Employment Appeal Board and Labor Commissioner Byron K. Orton, 722 NW2d 183, 191-192 (Iowa 2006) (holding that Labor Commissioner's use of an OSHA instruction and standard interpretation was not unlawful rulemaking because they were used as an aid in interpreting the regulation that the city was charged with violating as relevant to the factual situation and not to establish a rule of law in the proceeding).

<sup>25</sup> See attachment to DNR Exhibit 8 and Winnebago Exhibit 2

product to the other under a single purchaser contract;

- Whether there is a support or dependency relationship between the two entities such that one would not exist "but for" the other.

As noted by the District Court, the EPA described such determinations as "factually driven."<sup>26</sup> The four factors provide a framework for identifying and evaluating facts relevant to making difficult case-by-case common control determinations using the SEC definition of control. They do not establish a new rule of law. All four factors are consistent with the Security and Exchange Commission's (SEC) rather broad definition of control found at 17 CFR 210-1-02(g): "...the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise." (emphasis added)

The District Court Ruling remanded this case back to the agency for hearing on the merits to determine whether Winnebago has the ability to control the pollution control decisions of CDI. This necessarily requires application of the SEC definition of control, but application of the SEC definition does not preclude consideration of the four factors discussed in the EPA guidance documents as they relate to the specific facts presented in this case. See District Court Ruling, pp. 4-6.

***B. Did The DNR Fail To Properly Consider and Evaluate "Common Control" As A Separate Required Element When Making the Initial Single Source Determinations?***

The term "support facility" first appears in the August 7, 1980 federal preamble to the PSD rules as part of a discussion of the second prong of the stationary source definition, i.e. whether two facilities are in the same industrial grouping or share the same SIC code. In this context, the EPA stated that the one source classification encompasses both primary and support facilities, even when the latter includes units with a different two digit SIC code. The federal preamble described "support facilities as "typically those which convey, store, or otherwise

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<sup>26</sup> District Court Ruling, pp. 4-5. This is also consistent with the federal preamble, see DNR Exhibit 5

assist in the production of the principal product." (DNR Ex. 10 at 52695) In other words, if one facility is found to be a "support facility" to the second facility, it is not necessary to show that they share the same SIC code.

Early on, the DNR concluded that even if CDI and Winnebago did not share the same SIC code, they were still part of the same industrial grouping because CDI was a "support facility" for Winnebago. Appellants assert that DNR staff essentially stopped their single source analysis after concluding that CDI was a "support facility" for Winnebago and never went the required further step to evaluate whether the facilities were also under common control.

Based on this record, it does appear that some DNR employees used the term "support facility" as shorthand or as a substitute for "common control" when they were actually referring to a support/dependency relationship establishing common control. (Tr. 107, 379, 389) As previously described in subsection I(a) above, the EPA's guidance documents describe four factors to be considered when applying the SEC definition of control to specific facts on a case-by-case basis. The first two factors clearly relate to situations where there is direct control, either through ownership or by contract. The third and fourth factors relate to situations where there may be indirect possession of the power to control:

- Whether there is a contract for service relationship between two entities in which one sells all of its product to the other under a single purchaser contract?
- Whether there is a support or dependency relationship between the two entities such that one would not exist "but for" the other."

At times it appears that DNR staff were simply imprecise or sloppy in the their use of terminology and interchanged "support facility" and "support or dependency relationship such that one would not exist but for the other." At other times, however, it appears that DNR staff were actually substituting the less rigorous "support facility" analysis for the more rigorous "support or dependency" relationship such that one entity would not exist "but for" the other.

In the initial letter conveying the single stationary source determination, Christopher Roling states that common

control is established when "there is a contract for service relationship between the two companies" or "if a support/dependency relationship exists between the two companies." The DNR concluded that the relationship met the criteria for "support/dependency relationship" because CDI had a contract to paint motor homes for Winnebago and because Winnebago was CDI's only customer, thereby making CDI a wholly dedicated support facility. (DNR Exhibit 8, p. 3) At that time, CDI had informed the DNR that Winnebago would be its only customer and the DNR had not reviewed the services agreement to see that there was a potential for CDI to have other customers.

In 2002, DNR published a Fact Sheet in connection with the public notice that was published for CDI's air permits. The Fact Sheet states that the CDI facility will be used for painting recreational vehicles and the DNR "has determined that this makes CDI, Inc. a "supporting facility" to Winnebago Industries. (CDI Exhibit 5, Tr. pp. 257-260)

On April 20, 2004, David Phelps, the supervisor of the DNR's Air Quality Construction Permits section, wrote to the EPA requesting guidance concerning CDI's application for modification of the air permit for its Forest City location. The first question posed to the EPA by Mr. Phelps suggests that the DNR had been proceeding on the assumption that it was not mandatory to establish common control before a support facility could be included in a major stationary source, so long as CDI serves as one of two painting lines for Winnebago and falls within the "common sense" concept of plant. (DNR Exhibit 31)

In addition, DNR staff concedes that they did not review the Forest City Service Agreement between CDI and Winnebago prior to making the initial single source determination but relied solely on the fact that there was a service agreement and on CDI's oral representations that Winnebago would be CDI's only customer. (Tr. 96-97, 188, 256) The April 27, 2004 cover letter that accompanied the initial air permits for CDI's Charles City facility stated only that the DNR had determined that CDI is a "support facility" to Winnebago. (Winnebago Exhibit 6) The single source determination for Charles City was based on the prior determination with respect to Forest City and the DNR's understanding that the two companies would have the same relationships in both locations. (Tr. 381, 383)

Based on these examples and others in the record, it appears that the DNR's early analyses of common control did not include thorough evaluation of all of the pertinent facts relevant to common control. However, CDI did not raise objections to the DNR's single source determination until the March 29, 2004 meeting with DNR, and CDI did not file its first formal appeal of the single source determination until May 24, 2004. After the issue was raised by CDI and the appeals were filed, the DNR clearly conceded that common control is a mandatory element of the single source determination requirement. Since that time, the DNR staff has gone through a fact specific analysis of the relationship between CDI and Winnebago, based on the SEC definition of control and the portions of the EPA guidance documents that it felt were relevant, to determine whether CDI and Winnebago are in fact under common control. (See, e.g. DNR Exhibit 34-January 10, 2005 letter from Anne Preziosi to Madonna McGrath)

***C. Based On The Hearing Record, Has The DNR Established The Common Control Element By A Preponderance Of The Evidence?***

***1. Direct Control***

Based on this record, there is no doubt that CDI and Winnebago are separate companies with separate corporate identities, financial structures, owners, and employees. There is no evidence that Winnebago has the power to directly control CDI at either location, Forest City or Charles City. Unlike the factual situations presented in several of the EPA guidance documents, Winnebago does not own CDI's buildings or any of its equipment in Forest City or Charles City. Winnebago does not provide utilities to CDI. Winnebago does not have the ability to physically start up or shut down CDI's production lines.

The two owners of CDI have significant experience and business interests in the coating industry in Elkhart, Indiana and are not dependent on Winnebago in order to have successful business operations in the RV industry. They have made their own decisions concerning what paint to use, and later sought out the technology and made changes in their choice of paint when a different formulation would reduce their emissions and assist them to comply with permit conditions. Other than one early letter advising

Winnebago of its air permit negotiations with DNR and asking for advice, there is no evidence of direct communications between CDI and Winnebago concerning pollution control decisions. There is no evidence that Winnebago helped CDI with its permit applications or advised CDI in its selection and retention of environmental consultants. CDI and Winnebago attended only one joint meeting with DNR, which occurred after the initial single source determination was made.

Winnebago's CEO and its director of environmental compliance credibly testified that they had little personal knowledge concerning CDI's pollution control efforts. Winnebago appears to have taken a consistently conservative approach to environmental compliance. (Testimony of Robert Olson, pp. 507-508, 511-512; Wayne Venzke, pp. 513-515) It does not appear that Winnebago's management would have directed or encouraged CDI management to purposefully violate its permit conditions. The decision to violate the permit conditions does appear to have been made by CDI's management without consulting Winnebago.

## **2. Indirect Control**

The crux of the DNR's position is that Winnebago possesses *indirect* power to control CDI's pollution control decision-making at Forest City and Charles City because Winnebago is essentially CDI's only customer and Winnebago directly influences CDI's production levels, facility size, and therefore the volume of pollution emissions by the number of motor homes that it sends to CDI for painting. Unlike some of the factual situations in the EPA guidance documents, CDI is not 100% dedicated to providing services to Winnebago. The Service Agreements do permit CDI to provide services to non-competitive customers so long as doing so does not interfere with its ability to paint Winnebago's products. (See DNR Exhibits 19, 20, p. 2). However, as revealed at hearing, CDI has few customers besides Winnebago, and it is clear that other customers provide a negligible portion of CDI's production volume and pollution emissions (less than 1% at Forest City and less than 2% at Charles City). (Testimony of David Nagle, Tr. pp. 424-426, 438; DNR Exhibit 30)

While Winnebago does not have direct control over the start up or shut down of CDI's facilities, CDI's production volume is directly tied to Winnebago's production volume. While there may be some lag time, CDI must operate or not

operate its facilities in direct response to Winnebago's production schedule.

The most obvious evidence of the direct relationship between production volume and pollution control decisions at CDI came from statements made by CDI General Manager David Nagle, who admitted that on November 2, 2004 that CDI violated its air quality construction permit limits and operated new equipment without waiting for DNR to issue the permits because Winnebago was providing motor homes to CDI that had to be painted or Winnebago would have to lay off 800 people. (DNR Exhibit 2; Testimony of David Nagle, Tr. 442) Mr. Nagle's testimony at hearing did nothing to explain or modify the clear implication of this admission: CDI's success and survival is entirely dependent upon Winnebago, so much so that CDI would feel compelled to violate its permit conditions rather than violate the terms of its Services Agreement with Winnebago by not painting the motor homes that Winnebago provided. Moreover, Mr. Nagle testified that CDI had to expand its Forest City facility six months after opening and apply for air permits allowing for more emissions because "...it came that their product was being received so well on the field that-by the consumer that the- need for us to paint more motorhomes existed, and we had to expand to accommodate that." (Testimony of David Nagle, Tr. p. 435) In addition, CDI's permit applications have stated that their proposed expansions were necessary to accommodate the increased demands at Winnebago Industries. (DNR Exhibits 16, 17)

CDI's services do not appear essential to Winnebago's survival. Winnebago had provided its own painting services in the past and could do so again, although it does not currently have the capacity to provide the same high quality custom painting services as CDI. However, the evidence in the record clearly establishes that CDI's survival at Forest City and Charles City is entirely dependent upon Winnebago, i.e. CDI and Winnebago have a support/dependency relationship such that CDI would not exist at these locations but for its relationship with Winnebago.

In its early correspondence with Winnebago prior to entering into the Service Agreements for Forest City and Charles City, CDI characterized itself as "putting all our eggs" in the Winnebago basket. (DNR Exhibits 23, 27). The Services Agreements that followed these exchanges explicitly state that CDI's investment in the projects is

with the sole intent of expansion of business by providing services to Winnebago. The location and size of the facilities...are entirely dependent upon the commercial relationship between the parties. If the relationship should deteriorate or terminate, then CDI will have little or no interest in continuing to operate the business at this location. (DNR Exhibit 19, p.4; Exhibit 20, p. 5). The testimony and evidence offered by CDI and Winnebago at hearing did not modify or change the clear meaning of these contract provisions.

The wholly dependent nature of CDI's relationship to Winnebago is reinforced by the fact that if the parties terminate the Services Agreements, Winnebago has the right to take over CDI's real estate leases, capitalized equipment leases, and the equipment that CDI owns. (DNR Exhibit 19, p. 4; Exhibit 20, p. 5) Moreover, CDI presented no evidence to establish or even suggest that it would be able to continue to operate its painting facilities at Forest City and Charles City if it did not have Winnebago as its customer.

The preponderance of the evidence in the record established that Winnebago possesses, indirectly, the power to control CDI's construction and pollution control decisions at its locations in Forest City and Charles City. In examining the SEC definition of control found at 17 CFR §240.12b-2 and applying it on a case-by-case basis to specific facts, the EPA has examined four factors as relevant to the control determination, and two of those factors are directly relevant to the facts of this case. CDI and Winnebago have a contract for service relationship which limits CDI's ability to perform services for customers other than Winnebago. In practical effect, given both the terms of the agreement and CDI's locations in northern Iowa, the services agreements effectively limit CDI's outside business to less than 1% in Forest City and less than 2% of overall production in Charles City. In addition, CDI has a support/dependency relationship with Winnebago such that the CDI facilities would not exist at Forest City or Charles City but for its service relationship with Winnebago. Several years of operations under the Services Agreements have demonstrated that CDI essentially operates as part of Winnebago's production line. When Winnebago's production levels increase, CDI's production levels and pollutions emissions correspondingly increase. Conversely, when Winnebago's production levels

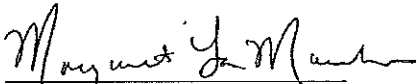


decrease, CDI's production levels and pollution emissions decrease. CDI's decisions to expand its facility, seek new paint technologies to reduce VOC and HAP emissions, install new pollution control equipment, and ultimately to violate its permit conditions, were all the direct result of Winnebago's increased production.

**DECISION AND ORDER**

IT IS THEREFORE ORDERED that the determinations made by the Iowa Department of Natural Resources that CDI, Inc. and Winnebago Industries constitute a single stationary source at their locations in Forest City, Iowa and at Charles City, Iowa are found to be correct and are hereby AFFIRMED.

Dated this 11<sup>th</sup> day of August, 2008.



Margaret LaMarche

Administrative Law Judge

Department of Inspections and Appeals

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Des Moines, Iowa 50319-0083

cc: Madonna F. McGrath

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Any adversely affected party may appeal this proposed decision to the Environmental Protection Commission within thirty (30) days after receipt of the proposed decision. 561 IAC 7.17.(5).

## ATTACHMENT "A"

Record Index for Administrative File 06DNR008:  
[From Transmittal to DIA until evidentiary hearing on 5/28/08]

1. Cover Letter, 1/28/05 (DNR to CDI) transmitting (18) Air Quality Permits to CDI for its Charles City facility
2. Notice of Appeal filed by CDI from the issuance of (18) Air Quality Permits for its Charles City Facility, 2/17/05
3. Notice of Appeal filed by Winnebago, 3/25/05, from the Title V Operating Permit for its Forest City facility and from the determination that Winnebago and CDI are one major stationary source.
4. Notice of Appeal filed by CDI, 11/22/05, from (24) Air Quality Construction Permits for CDI's Forest City facility. (with attachment A)
5. Notice of Hearing (Consolidated), issued 3/31/06
6. Order Severing Appeal (Winnebago Title V Operating Permit); Continuance Order; Case Management Schedule, 5/5/06
7. Winnebago Petition, filed 4/17/06
8. CDI Petition, filed 4/21/06
9. DNR Answer to CDI Petition, filed 5/12/06
10. DNR Answer to Winnebago Petition, filed 5/16/06
11. DNR Response to Request for Admissions and DNR First Set of Interrogatories, filed with DIA 6/21/06; DNR Motion to Produce, filed with DIA 8/11/06
12. Witness and Exhibit Lists: DNR , 8/16/06; Winnebago, 8/25/06
13. Motion to Extend Discovery, 8/25/06; Order Extending Discovery, 8/29/06
14. Winnebago, CDI Subpoena request, 9/15/06; DNR Motion To Deny Subpoenas;
15. Joint Motion to Extend Time for Briefing Schedule; Order Extending Briefing Schedule, 10/11/06
16. DNR Motion for Consolidation of Appeals (12 total), 10/25/06; Ruling Granting Motion for Consolidation of Appeals, 12/7/06
17. DNR Motion for Summary Judgment, 10/25/06; Brief in Support of Motion for Summary Judgment; Attachments to Motion (Blue bound notebook)
18. CDI and Winnebago Resistance To Motion for Summary Judgment; Brief in Support of Resistance; Joint Appendix, 11/15/06
19. DNR Reply To CDI and Winnebago Resistance
20. Ruling on DNR's Motion for Summary Judgment, 12/29/06
21. CDI, Winnebago Motion to Enlarge or Amend Judgment or Alternative Petition for Rehearing, 1/9/07; DNR Response and Resistance, 1/22/07; ALJ Response To Motion to Enlarge..., 1/24/07
22. Record before EPC and District Court (indexed in DNR's 5/12/08 cover letter to ALJ)
23. CDI Motion Requesting Scheduling Conference, 1/29/08 and attached District Court Ruling
24. Notice of Scheduling Conference, 2/11/08
25. Scheduling Order/Notice of Hearing Date, 3/3/08
26. CDI and Winnebago Statement of Factual Issues and Established Matters, 3/28/08

27. Parties' Statement of Factual and Legal Issues, 4/1/08
28. DNR Statement of Factual Issues, 4/1/08; DNR Amended Statement of Factual Issues, 4/4/08
29. Winnebago Final Witness and Exhibit List, 5/16/08
30. CDI Final Witness and Exhibit List. 5/20//08
31. DNR Witness and Exhibit List, 5/21/08

ATTACHMENT "B"

EXHIBIT LIST

DNR Exhibit 1: DNR Inspection Report and Cover Letter, 11/26/03

DNR Exhibit 2: Carper Memo To Record, 11/3/04

DNR Exhibit 3: Chris Roling Resume

DNR Exhibit 4a-g: Demonstrative Exhibits-Air Quality Program

DNR Exhibit 5: 9/11/80 Federal Register Preamble, 45 FED REG 59874

DNR Exhibit 6: Map

DNR Exhibit 7: Timeline

DNR Exhibit 8: 4/22/02 Letter (Roling to Nagle)

DNR Exhibit 9: John Bibbo Business Card-Carrera Designs (Dave Nagle handwritten)

DNR Exhibit 10: 8/7/80 Federal Register Preamble-45 FED REG 52675

DNR Exhibit 11: EPA Guidance Document, 8/11/89

DNR Exhibit 12: Excerpt, New Source Review Manual re: Stationary Source

DNR Exhibit 13: Dave Phelps Resume

DNR Exhibit 14: June 2002 BACT and Additional Impacts Analysis (CDI-Forest City)

DNR Exhibit 15: 9/16/02 Cover Letter and Permits for CDI-Forest City

DNR Exhibit 16: May 2003 BACT and Additional Impacts Analysis-CDI Forest City

DNR Exhibit 17: December 2003 Revised BACT Analysis

DNR Exhibit 18: 10/18/05 Permit Cover Letter (Kuhn to Nagle)

DNR Exhibit 19: Forest City Services Agreement, 3/1/02

DNR Exhibit 20: Charles City Services Agreement, 2/27/04

DNR Exhibit 21: Form F1: CDI Air Construct Permit Application, 12/29/03

DNR Exhibit 22: Form F1: 8/23/05

DNR Exhibit 23: 7/6/01 Cover Letter (Bibbo and Schwartz to Winnebago) and attached comments on supply agreement

DNR Exhibit 24: 1/8/02 Letter (Hertzke to Vilsack)

DNR Exhibit 25: 5/15/02 Letter (Schwartz to Hertzke)

DNR Exhibit 26: excluded

DNR Exhibit 27: 2/7/03 Letter (Schwartz to Dakken) and attached CDI draft business plan for Charles City

Attachment B

Page 2

DNR Exhibit 28: 5/17/04 email (McGraw to Phelps)  
DNR Exhibit 29: 8/18/05 email (Nagle to Kuhn)  
DNR Exhibit 30: CDI Answers to Third Set  
Interrogatories  
DNR Exhibit 31: 4/20/04 Letter (Phelps to EPA)  
DNR Exhibit 32: 6/7/04 Letter (EPA to Phelps)  
DNR Exhibit 33: 8/27/04 Letter (EPA to Vonk)  
DNR Exhibit 34: 1/10/05 Letter (Preziosi to McGrath)  
DNR Exhibit 35: 1/13/05 Letter (Heiman to Fitzsimmons)  
DNR Exhibit 36: Catharine A. Raffensperger Fitzsimmons  
Resume  
DNR Exhibits 37-39: excluded  
  
CDI Exhibit 1: 12/21/01 Operating Agreement of CDI  
CDI Exhibit 2: 4/15/02 Email (Roling to Schmidt)  
CDI Exhibit 5: 8/2/02 Fact Sheet and draft permits  
Nos. 02-A-479-P through 02-A-488-P to  
CDI<sup>1</sup>  
CDI Exhibit 7: 10/25/02 Letter (Campbell to Nagle)  
CDI Exhibit 11: Letter (Nagle to EPA) with attached  
4/1/04 Letter (Nagle to Kuhn) and  
attached CDI Baseline Emission Position  
Paper and Separate Stationary Source  
Position Paper.  
CDI Exhibit 12: 4/27/04 Cover Letter (Kuhn to Nagle),  
transmitting 13 air quality  
construction permits for CDI-Charles  
City  
CDI Exhibit 17: 11/10/04 Letter (Latham to Nagle) and  
attached 10/28/04 letter (EPA to  
Latham) and 9/18/95 letter (EPA to  
Hamlin)  
CDI Exhibit 18: Curriculum Vitae-Gary D. McCutchen  
CDI Exhibit 19: 1/28/05 Cover Letter (Smith to Nagle)  
transmitting 18 air quality  
construction permits for CDI-Charles  
City  
CDI Exhibit 27: CDI Title V Permits (by official  
notice, no copy in record)  
CDI Exhibit 32: Definitions, Iowa Code §§521A.1, 476.72  
CDI Exhibit 34: Notices of Intended Action To Amend  
chapter 20 by EPC, 4/4/04

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<sup>1</sup> The draft permits were not attached to the exhibit. At the request of the parties, the ALJ took official notice of all permits issued by the DNR to CDI or Winnebago that were not physically included in the exhibits.

CDI Exhibit 35: "Support Facilities Revisited" by Gary McCutchen, Air Pollution Consultant, Vol. 14, Issue 5, 2004.

CDI Exhibit 43: DVD and Transcript of Deposition of Gary D. McCutchen, P. E., 4/29/08

Winnebago Exhibit 6: Same as CDI #12

Winnebago Exhibit 7: CDI 4/24/04 Notice of Appeal

Winnebago Exhibit 9: 6/7/04 Letter (Campbell to Appellants)

Winnebago Exhibit 10: CDI 6/18/04 Notice of Appeal

Winnebago Exhibit 11: Winnebago 7/7/04 Notice of Appeal

Winnebago Exhibit 13: CDI 2/14/05 Notice of Appeal

Winnebago Exhibit 14: Winnebago Title V Operating Permit, exp. 2/24/2010

Winnebago Exhibit 15: CDI 3/22/05 Notice of Appeal

Winnebago Exhibit 16: CDI 3/24/05 Notice of Appeal

Winnebago Exhibit 18: 10/18/05 Cover Letter (Kuhn to Nagle) transmitting 24 permits

Winnebago Exhibit 19: CDI 11/21/05 Notice of Appeal

Winnebago Exhibit 21: Winnebago 8/28/06 Notice of Appeal

Winnebago Exhibit 22: CDI 9/5/06 Notice of Appeal

Winnebago Exhibit 23: same as DNR #19

Winnebago Exhibit 25: same as DNR #20

Winnebago Exhibit 27: Winnebago Petition, 4/17/06

Winnebago Exhibit 28: DNR Answer to Winnebago Petition

Winnebago Exhibit 29: CDI Petition, 4/20/06

Winnebago Exhibit 30: DNR Answer to CDI Petition

Winnebago Exhibit 31: 12/3/07, Hancock County District Court Ruling